

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2012

CORAM

THE HONOURABLE MR.JUSTICE K.CHANDRU

Application Nos.2006 to 2008 of 2012
in
C.S.No.410 of 1982

- 1.Narendra Prasad
- 2.Kishen Prasad
- 3.Lokendra Prasad
- 4.Savitri Bai

... Applicants in
all three petitions

Vs.

- 1.Indian Express Newspapers
(Bombay) Private Limited,
Express Towers, Nariman Point,
Bombay.
- 2.Indian Express Newspapers
(Madurai) Private Limited,
Express Estates,
Club House Road,
Madras-600 002.
- 3.Express Newspapers Private Ltd.,
Express Estates,
Mount Road,
Madras-600 002.
- 4.Andhra Prabha Private Ltd.,
Tank Bund Road,
Hyderabad.
- 5.Traders Private Limited,
Express Towers,
Nariman Point,
Bombay-21.
- 6.Ram Gopal Jhaver
- 7.Devkishen Jhaver
- 8.Jai Kishen Jhaver
- 9.Vijaykishen Jhaver

10. Moongibai Goenka Educational Trust,
No.1 (New No.11) Ramanujam Iyer Street,
George Town, Madras.
11. Sri Swetember Jain Educational Trust,
Old No.11/12, New No.19,
Tholasingam Street,
George Town, Madras.
12. Goutamchand Galada
13. Gyamchand Galada
14. Sampat Bhai
15. Krishna Murali Rao
16. Ramalinga Chetty
17. Damodaran
18. Murugesan
19. Brown Catherine Mary Brown,
S/o. Mrs. Catherine Mary Bluntree Brown,
Punnemedu,
Kathivakkam Village, Ennore Taluk
20. Brown John Williams
21. Thomas James Stedman
22. Daiel Williams Tailor
23. Vivek Goenka
24. Radhadevi Sonthalia
25. Saroj Goenka
26. Aarti Agarwal
27. Ritu Ganeriwal
28. Kavita Singhania . Respondents in all applications

A.No.2006 of 2012 is preferred to reopen the evidence of the plaintiffs and defendants in the suit.

A.No.2007 of 2012 is preferred to recall the evidence of the plaintiff and the defendants in the suit.

A.No.2008 of 2012 is preferred to permit the applicants / plaintiffs to mark the documents as annexed in the application .

For Applicants : Mr.S.R.Sundar

For Respondents : Mrs.Hema Sampath, SC
for Mr.T.N.Seetharaman

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COMMON ORDER

These three applications were filed by the applicants, who are plaintiffs in the suit in C.S.No.410 of 1982. The suit is for the grant of declaration that the suit properties are the properties held in the trust for the benefit of the plaintiffs by the first defendant and that he had no right to alienate the same and that defendants 2 to 23 have no right or title or interest upon the suit properties and also for several other reliefs.

2.The written statements were filed and issues were framed as early as on 30.10.1986. Subsequently, the suit was tried and the trial commenced from March 1996. The evidence was completed during November, 1996.The arguments were heard in the main suit. The arguments were commenced from November, 1996 and concluded during March, 1997. The judgment was reserved by A.Raman, J. Thereafter, written arguments were also filed by parties during April, 1997 after getting the leave of the court. The matter was listed on 19.7.2000 when both parties expressed their no objection for delivering the judgment despite long delay and that the matter was posted on 21.7.2000 in the Chamber of the learned Judge. But it was not listed. However, the learned Judge retired on 24.7.2000 without pronouncing the

judgment. Subsequently, the suit was not listed for final disposal before any court.

3. At this stage, the applicants/ plaintiffs came to know that the defendant No.24 in the suit had filed a suit before the original side of the Bombay High Court in Suit No.4538 of 1993 admitting that the funds received by the defendant's father was from that of the plaintiffs' father and out of the income derived from the firm of the plaintiffs' father. Therefore, in the light of the new disclosure, the applicants / plaintiffs wanted to reopen the suit and to file additional documents as set out in the judges summons filed in support of the applications and by reopening, no prejudice will be caused. Further, if the documents are admitted no prejudice would be caused to the defendants as the statements made in the pleadings and evidence tendered in the Bombay High Court would constitute admissions on the part of the defendants. The applicants had taken time to get the certified copies of documents which are essential in deciding the matter. It is in that view of the matter, the three applications were filed to reopen the evidence of the plaintiffs, to recall the evidence of the plaintiffs and the defendants in the suit and to permit the applicants to mark the documents as

annexed in the judges summons.

4. Notice was issued to the respondents. The respondents 23 to 28 have filed a common counter affidavit, dated 18.6.2012 sworn to by the 24th respondent. In the counter affidavit, it was stated that the allegation of illness pleaded by the applicants was denied. The court proceedings cannot wait for recovery of documents made by the first applicant. If the first applicant was ill, it is not clear as to why the other applicants were keep quiet. The applicants / plaintiffs were not diligent in pursuing the suit. No attempt was made by them to get the suit listed. It only shows the utter indifference of the plaintiffs to pursue the suit. The applications were filed in the year 2010, but they were numbered after a period of two years. The first applicant had not stated as to how he came to know the pendency of the suit pending before the Bombay High Court and the applicants were not parties to the suit in Bombay High Court. The documents relating to the suit cannot be received in evidence. There was no explanation as to how he came to know about the Bombay suit and how he had obtained the copies. The trial was commenced in the suit in March, 1996 and the deponent was in the witness box for a long time and marked hundreds of

documents. They ought to have produced these documents at that time. The pendency of the Bombay suit was not disclosed in the evidence. The documents are not relevant to the case on hand. The family dispute cannot be used as evidence in the suit. Even otherwise, those documents cannot be marked through the plaintiffs. The schedule only consists of photocopies, which cannot be marked as documents in the suit. The respondents will be put to prejudice if the applications are allowed. If the applicants were keen on these documents, they should have produced them pending trial and they cannot start a fresh trial.

5. The applicants have filed a rejoinder, dated 7.7.2012. In the rejoinder, it was stated that the first applicant was having the Power of Attorney for other applicants. Therefore, the other applicants could not have done anything worthwhile. The computer information showed that it was disposed of. But, on very late, it was found out that the suit was still pending. The first applicant when he came to know about the pendency of the suit, he immediately engaged a counsel to verify the same and get the certified copies from the Bombay High Court. As he was not informed about the suit, he could not file it at an

early time. As to how the first applicant obtained copies are not relevant to the case on hand. The documents are very much relevant for trial in the pending suit.

6.The applications were filed under Section 151 C.P.C. and not under Order 18 Rule 17. The counsel for the applicants placed reliance upon a judgment of the Supreme Court in **Salem Advocate Bar Assn. v. Union of India** reported in (2005) 6 SCC 344, wherein the Supreme Court while analysing Order 18 Rule 17-A, dealt with the scope of leading additional evidence. It is necessary to refer to paragraph 13 of the said judgment which reads as follows :

"Additional evidence

13.In *Salem Advocate Bar Assn. case* [(2003) 1 SCC 49] it has been clarified that on deletion of Order 18 Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment i.e. 1-7-2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order 18 Rule 17-A, the court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18 Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the

party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just."

7.The counsel also referred to a judgment of this court in **K.Subramanian Vs. S.Balashanmugam** reported in **2004 (4) CTC 17**, wherein the scope of Order 18 Rule 17 was set out in paragraph 5, which reads as follows :

"5.Order 18, Rule 17, CPC states, "The Court may, at any stage of a suit, recall any witness, who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit." On a plain reading of this Section, it would appear that the witness may be recalled at any stage and the Court alone can put questions to the witness, if the Court thinks fit. But, however, there is no impediment or prohibition for a party also to recall himself or to recall any other witnesses, who has already been examined, to elucidate the matter in issue. As such, the parties to the suit are entitled to recall any witness, who has already been examined, subject to, of course, that there should be proper reason to recall the witness for further examination. In the instant case, the petitioner has stated that he wants to produce further documentary evidence, which are Court records, which he could not produce at the time when he was examined and only in the said circumstances, he sought permission of the Court to recall himself for further examination. In the facts and circumstances of the case, I feel that the petitioner should have been given an opportunity to recall himself for

producing documentary evidence as prayed for, but, denying of such an opportunity to the petitioner would seriously affect the case of the petitioner."

8.Per contra, Mrs.Hema Sampath, learned Senior counsel leading Mr.T.N.Seetharaman, the counsel for the defendants, referred to a judgment of the Supreme Court in **Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate** reported in **(2009) 4 SCC 410 = AIR 2009 SC 1604** and in paragraphs 25 to 31, the Supreme Court had observed as follows :

"25.In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

26.As indicated by the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared.

27.In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in

question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after the cross-examination of the witness that certain lapses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed.

28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

30. Of course, if the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the trial court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the present case.

31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of

Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out."

9.The learned Senior Counsel also referred to a judgment of the Supreme Court in **K.K. Velusamy v. N. Palanisamy** reported in (2011) 11 SCC 275 and referred to paragraph 13 which reads as follows :

"13.The Code earlier had a specific provision in Order 18 Rule 17-A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1-7-2002. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only ²⁸⁴means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence."

10.But, however in the same judgment in paragraphs 14,16,

19 and 20, the Supreme Court had observed as follows :

"14. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for reopening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

16. Neither the trial court nor the High Court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.

19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of

various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

20. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application."

11. The said judgment, far from helping the case of the respondents, is helping the case of the applicants. As noted already, the applications have been filed under Section 151 and that the reason for reopening has been set out in the affidavits filed in support of the applications. It is not a case where the applicants/ plaintiffs were responsible for delaying the disposal of the suit. On the other hand, it was because of the court was not able to pronounce the judgment, the matter has been hanging fire for the last 12 years. Ultimately, it only shows the cracking down of civil jurisdiction where there is no guarantee for timely justice by the civil court. Merely because the court has delayed the matter in pronouncing the order, it cannot be put against the applicants as the reason for delaying tactics. The applicants have made out a case for reopening the suit. At this stage, this court is not concerned with the relevancy of the documents or the nature of proof to be rendered. It is suffice that subsequent to the judgment was reserved only, the applicants came across the pendency of the suit in the Bombay High Court and had obtained the certified copies. It is for them to prove those documents in the manner known to law. The documents can be allowed to be received only

subject to proof and relevancy. Since the judgment has not been pronounced for the last 12 years and there is new discovery of fact and documents, it is a fit case where the applications can be allowed.

12. Accordingly, all the three applications will stand allowed. The suit is directed to be posted for recording evidence, but the documents are to be received subject to proof and relevancy as noted above. No costs.

Sd/- K.C.J
18.10.2012

//Certified to be a true copy//

Dated this the day of 2012.

R.s/17.12.2012

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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